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Supreme Court, U. S.
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MICHAEL RODAK, JR., C

IN THE

Supreme Court of the United States

No. 72-564

October Term, 1972

THE BOARD OF EDUCATION OF CENTRAL DISTRICT NO. 1 of the towns of ADDISON, CAMERON, RATHBONE, TUSCARORA, WOODHULL, THURSTON, ERWIN, LINDLEY and CANISTEO, STEUBEN COUNTY, NEW YORK; EDWARD J. BROWN, District Principal, Central School District No. 1, CARL PILLARD, Principal, Addison High School, and ROBERT ANDREWS, President of the Board of Trustees of Central District No. 1,

Petitioners,

against

CHARLES JAMES,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING WRIT OF CERTIORARI

STATEMENT OF COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK, *AMICUS CURIAE*

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THE BOARD OF EDUCATION OF CENTRAL DISTRICT NO. 1 of the towns of ADDISON, CAMERON, RATHBONE, TUSCARORA, WOODHULL, THURSTON, ERWIN, LINDLEY and CANISTEO, STEUBEN COUNTY, NEW YORK; EDWARD J. BROWN, District Principal, Central School District No. 1, CARL PILLARD, Principal, Addison High School, and ROBERT ANDREWS, President of the Board of Trustees of Central District No. 1,

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STATEMENT OF COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK, *AMICUS CURIAE*

Statement

This Statement *Amicus Curiae* is submitted by Ewald B. Nyquist, as Commissioner of Education of the State of New York, in support of petitioners' petition for a rehearing of the Order denying the petition for a writ of certiorari herein.

Respondent James was dismissed by petitioner board of education in 1970.

He selected as his remedy the appeal to the Commissioner of Education, which was one of three remedies available to him.

The appeal was processed in due course, pleadings were filed and served by the parties, memoranda of law were submitted and an oral argument was held before the Commissioner of Education.

The decision of the Commissioner was rendered on September 23, 1970, dismissing the appeal.

Instead of seeking a review of the decision of the Commissioner adverse to him, respondent, ignoring the decision of the forum of his own choice, proceeded de novo in the United States District Court.

The Commissioner of Education was not named as a party and did not intervene as a party.

Relying on the axiomatic and fundamental doctrine of law that a Court cannot pronounce judgment against anybody who is not a party to the litigation before the Court, the Commissioner, as a courtesy to the Court submitted a Brief Amicus Curiae.

The District Court held against respondent, fully recognizing the basic law that, absent a review proceeding, the decision of the State tribunal becomes res judicata.

On appeal to the Second Circuit, however, that Court completely ignored this basic principal of law, improperly claiming that petitioners' objection and the decision of the District Court was based on a finding that Federal jurisdiction did not exist absent State Court review.

Neither the District Court nor petitioners nor Amicus, however, have given the Second Circuit any basis whatsoever for such a conclusion.

Both the District Court and petitioners and Amicus are fully aware of, and in agreement with the truism that a decision of the Commissioner can be reviewed either in the Federal Court or the State Court.

It is the crux of the position of petitioners and *Amicus*, as well as the District Court, that the doctrine of collateral estoppel as well as the Full Faith and Credit Clause of the United States Constitution prevent the raising of the same issues in an independent Federal action which issues have been completely litigated in a State tribunal of competent jurisdiction.

The intervening circumstances of substantial effect required by Rule 58 of the Rules of this Court are found in a decision of a State Supreme Court Justice rendered after the decision of the Second Circuit and which State Court decision, it must be presumed, is based on, the fact that the Second Circuit completely ignored the doctrines of collateral estoppel and *res judicata*. If this type of procedurally improper handling of decisions of the *Amicus Curiae* is to become the rule, obviously the entire institution of the judicial function of the Commissioner of Education, which goes back for exactly 150 years and which has been vitally instrumental in shaping the New York State school system into a State school system, will be lost, to the most serious detriment to the pupils of the State of New York.

While denial of certiorari, of course, is not tantamount to an affirmance, at the same time, for the purpose at hand, the decision of the Second Circuit becomes the law of the State of New York.

It is vital that the Court, furthermore, resolve the divergence of opinion thus created between the Second Circuit on one hand and the Third and Ninth Circuits on the other hand, as shown by the decisions hereinafter referred to.

Questions Presented

1. Does not the Full Faith and Credit Clause of the United States Constitution require the acceptance of an unappealed decision of a State tribunal of competent jurisdiction in subsequent independent litigation of the identical issues in a Federal Court?

2. Does not the doctrine of collateral estoppel prevent a Federal Court from rendering a new decision in *de novo* litigation of issues already fully litigated and decided by a State tribunal of competent jurisdiction, but absent an appeal from, or review proceeding against, such State tribunal's decision?

3. Is it not axiomatic that a Court cannot render a decree against a person not a party to the litigation in which the decree is rendered?

4. Should not this Court set at rest a divergence of opinions between the Second Circuit on one side, and the Third and Ninth Circuits on the other?

ARGUMENT

POINT I

The full faith and credit clause of the United States Constitution.

Article IV section 1 of the United States Constitution requires all Federal tribunals to give full faith and credit to unappealed decisions of any State tribunal of competent jurisdiction relating to issues which were fully litigated before such tribunal, as well as those which could have been litigated in such form, but were not:

Magnolia Petroleum Co. v. *Hunt*, 320 U. S. 430.

Consequently, the decision of the Second Circuit herein is void against all parties:

U. S. v. *Silliman*, 167 F. 2d 607;
Milwaukee County v. *M. E. White Company*, 296 U. S. 268, 272;
Boothe v. *Baker Industries, Inc.*, 262 F. Supp. 168;
Stoll v. *Gottlieb*, 305 U. S. 165; reh. den. 305 U. S. 675;
Midessa Tel. Co. v. *Motion Picture etc.*, 290 F. 2d 203; cert. den. 368 U. S. 827;
Wayside Transportation Co. v. *Marcell's Motor Exp. Inc.*, 284 F. 2d 868;
Case v. *Mountain Timber Co.*, 210 F. 565;
American Surety Co. v. *Baldwin*, 287 U. S. 156, 166.

"The full faith and credit clause . . . applies to judicial proceedings of a state court drawn in question in an independent proceeding in the federal court". (Many citations).

POINT II

Divergence of opinions between the Second Circuit and the Third and Ninth Circuits.

The decision of the Second Circuit herein is contrary to the decision of the Third Circuit in *U. S.* v. *Silliman, supra* and the decision of the Ninth Circuit in *Warren* v. *Lawler*, 343 F. 2d 351.

The interests of subtantial justice require that this Court settle this matter among the conflicting Circuits.

POINT III

Collateral estoppel.

The collateral estoppel provisions of *res judicata* are clearly applicable in the present case.

The strict application of the collateral estoppel provisions which are axiomatic, is, moreover, of vital importance to the judicial functions of the Commissioner of Education who has had these judicial functions since 1822. These functions were given to the Chief State School Officer in the interests of the New York State Education System and have served the school system well over the many years, in that the Commissioner of Education has built a body of "common law" for the school system of the State, which gives guidance and direction to the presently 760 school districts of the State. The Commissioner is called upon to render approximately 150 decisions per year in his judicial capacity.

This judicial function of the Commissioner is the most important tool for the cohesive structure of the State School System, placed, as it is, in the hands of the top

educational expert of the State, who is traditionally selected by the Board of Regents as the outstanding educator of the United States.

Unless this untenable decision of the Second Circuit is reversed, most grievous damage will arise to the judicial function of the Commissioner and thus to the State Education System.

The following cases clearly indicate the procedural error of the Second Circuit in the premises:

U. S. v. *Silliman, supra,*
Sunshine Anthracite Coal Co. v. *Adkins,* 310 U. S. 381, 403,
U. S. v. *R. C. A.,* 358 U. S. 334, 352,
Cox v. *Kirby Lumber Corp.,* 197 F. 2d 812; cert. den. 344 U. S. 903,
Merrell v. *U. S.,* 140 F. 2d 602,
Stoll v. *Gottlieb, supra,*
Case v. *Mountain Timber Co., supra,*
Sealfon v. *U. S.,* 332 U. S. 575,
Warren v. *Lawler,* 343 F. 2d 351,
Forsyth v. *Hammond,* 166 U. S. 506.

Conclusion

For all the foregoing reasons, it is respectfully submitted that the petition for rehearing should be granted and that certiorari should be granted so that a decision of this Court on the procedural errors of the Second Circuit may be had in the premises.

The danger of other tribunals following the example of the Second Circuit herein is amply demonstrated by the decision of Mr. Justice Sullivan of the Onondaga

County Supreme Court, copy of which is attached hereto and made a part hereof as Appendix 1.

While the Justice does not specifically refer to the decision of the Second Circuit herein, that decision became immediately known throughout the State and it must be presumed that the Justice followed the example of the Second Circuit, rendered sometime prior to the Justice's decision. Such decision, it is submitted, constitutes the intervening circumstance of substantial effect referred to in Rule 58 of the Rules of this Court.

The granting of the petition for a rehearing herein, is therefore, as indicated, of vital importance to the New York State School System in areas far beyond the substantive merits of this specific case.

Respectfully submitted,

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APPENDIX 1

Decision

STATE OF NEW YORK

SUPREME COURT—County of Onondaga

FRED ANKEN, MALCOLM NOBLE and KEITH TOMPKINS, on behalf of themselves and all other residents of the SANDY CREEK CENTRAL SCHOOL DISTRICT NO. 1, OSWEGO, JEFFERSON, ONEIDA and LEWIS COUNTIES, NEW YORK, similarly situated,

Petitioners,

against

THE BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 1 OF THE TOWNS OF SANDY CREEK, ORWELL, REDFIELD, BOYLSTON and RICHLAND, OSWEGO COUNTY, ELLISBURG, JEFFERSON COUNTY, OSCEOLA, LEWIS COUNTY, and FLORENCE, ONEIDA COUNTY, NEW YORK.

Respondent.

Article 78 Proceeding to review and annul a decision of the Commissioner of Education.

Onondaga County Motion Term, September 8, 1971. Finally submitted: January 31, 1972.

Appearances:

Robert M. Weldon, Esq., Attorney for Petitioners, 131 Sherman Street, Watertown, New York.

Calvin B. Chamberlain, Esq., Attorney for Respondent, 8646 Lake Street, Sandy Creek, New York.

Appendix 1—Decision

EUGENE F. SULLIVAN, *J.*

In this Article 78 proceeding, the above named petitioners, Fred Anken, *et al.*, and all those on whose behalf they are acting, are residents and duly qualified voters of the above named respondent, Board of Education of Sandy Creek Central School, etc., District No. 1 (Board), New York. These petitioners request that this Court annul and reverse the determination and decision of the Commissioner of Education (Commissioner), which is dated June 7, 1971, with respect to an election or vote at a District Meeting heretofore held on January 15, 1971, on the proposition for which said meeting was called and held, namely:

> whether or not the construction of (1) a new school building, (2) a new bus garage, (3) a modification of an existing building, and (4) the financing thereof at a total cost of $1,952,000.00, should be authorized;

and to declare said District Meeting election to be null and void, and to order the fifteen (15) names of those who were then living at a charitable home, known as "Unity Acres", which is located in the Town of Orwell, Oswego County, in said District, and the names of those who illegally voted or were unqualified to vote at said election, be stricken from the list of qualified voters, and to order a new District Meeting to again vote on the aforementioned proposition.

The canvas of the vote at the meeting was 584 in favor and 580 against the proposition.

By its answer, the respondent alleges, in substance, that the fifteen (15) persons from "Unity Acres", who were allowed to vote, were bona fide residents of the

District and entitled to vote. (*Note*: The respondent admits that two (2) of these fifteen (14) persons, who voted, had not resided in the District for 30 days).

For a first affirmative defense, respondent alleges that the petitioners instituted the original appeal or petition in the instant proceeding, to the Commissioner, pursuant to Section 310 of the Education Law, and that the Commissioner rendered his decision which is "final and conclusive, and not subject to question or review in any place or in any court whatever", and that, as a matter of *res judicata*, the petitioners are barred from bringing this proceeding.

"• • •. While section 310 of the Education Law gives the commissioner the power to determine disputes concerning all matters under the Education Law and expressly states that his determination in such matters shall not be subject to 'question or review in any place or court whatever', the courts have *not held that this prevents a judicial review* of an arbitrary or unlawful act on his part (*Matter of Fabricius* v. *Graves*, 254 A. D. 19; *Matter of Beam* v. *Wilson*, 279 A. D. 277). • • •. However, it seems that this section (2037 of the Education Law, supplied) also forecloses review only to the extent that review is limited in a case arising under section 310 (*Matter of Colson* v. *Allen*, 285 A. D. 797, 798)."

Matter of Eaton v. *Allen*, 1 Misc. 2d 496.

"• • •. The party seeking relief may apply to the courts since the remedy under section 310 of the Education Law is not exclusive (*Matter of Leeds* v. *Board of Educ.*, 19 Misc. 2d 860, affd. 9 A. D. 2d 905)."

Mtr. Stillman v. *School Dist.*, 60 Misc. 2d 819
Affd. 34 A. D. 2d 553.

See, also:

Mtr. of Bd. of Educ. v. *Nyquist*, 60 Misc. 2d 967, 969;
Mtr. Oyster Bay v. *Nyquist*, 36 A. D. 2d 199, 201.

Under the facts in the instant case, this Court finds that the Commissioner does not have sole jurisdiction to review the action taken at the school meeting on January 15, 1971, and that the petitioners should not be deprived of valuable rights. The Court should not be ousted of jurisdiction to determine the matter, notwithstanding another method of settling the controversy has been provided.

Matter of O'Connor v. *Emerson*, 196 A. D. 807 Affd. 232 N. Y. 561.

The respondent has not made a motion to change the venue of this proceeding to Albany County. Section 504 of Civil Practice Law and Rules, subdivision 2, provides that the place of trial of all actions against a school district shall be for the county in which such school district is situate and if the district is in more than one county, in either. The instant proceeding has been instituted in Onondaga County in which no part of the district is situate. Section 506 provides that a proceeding against the Commissioner of Education shall be commenced in the Supreme Court, Albany County. However, Section 509 reads:

"Notwithstanding any provision of this article, the place of trial of an action shall be in the county designated by the plaintiff, unless the place of trial is changed to another county by order upon motion, or by consent as provided in subdivision (b) of rule 511."

"Venue (or place of trial) and jurisdiction are distinct concepts and should not be confused. • • • An

error in venue is not a jurisdictional defect. • • • the place of trial of an action shall be in the county designated by the plaintiff, unless the place of trial is changed to another county by order upon motion."

7 Carmody-Wait, 2d Section 48:2.

Since the petitioners designated Onondaga County for the place of trial, and since respondent has not moved to change the venue to Albany County, respondent's objection in point of law that this proceeding be dismissed is overruled.

With regard to respondent's objection, in point of law, that the Commissioner should be a party to this proceeding, it will be noted that the instant proceeding is against the Board of Education. It will be recalled that an unsuccessful endeavor was made to have the Commissioner become a party to this proceeding.

However, this Court received an affidavit by James H. Whitney, sworn to December 14, 1971, wherein he states that he is an attorney associated with Robert D. Stone, Esquire, counsel to the Commissioner of Education and that his affidavit is "made as a courtesy to the Court and should be considered in conjunction with the answer of respondent" and that "the Commissioner of Education does not seek leave to appear *amicus curiae* and does not wish this affidavit to be considered within that capacity."

This affidavit sets forth, upon information and belief, eight defenses or objections to the petition. These are similar to the objections and denials in respondent's answer. Thus, the Commissioner's views have been presented to the Court. They add nothing to those of the respondent.

It would seem that, if the respondent deemed the Commissioner a necessary or "desired" party, it could have moved the Court to join him as one.

The respondent's objection in point of law that the Commissioner of Education has not been made a party to this proceeding is overruled.

The facts presented to the Court, in this proceeding, were by petition, answer and affidavits.

Turning to the facts herein, the petition to the Commissioner on the appeal states that the qualifications for voters at the subject meeting are that they be (1) 21 years of age, (2) citizen of the United States, (3) resident of the District for one month or more immediately preceding the date of the special District Meeting.

In paragraph "11" of this petition, there are set forth fifteen (15) names of individuals living at "Unity Acres" at the time when they voted at the District Meeting on January 15, 1971.

In paragraph "10", it is alleged that petitioner, Anken, attempted to challenge the votes of these fifteen (15) persons specifically stating that they were guests at "Unity Acres", and that an agent of the School Board told Anken that he couldn't do anything about it. That these people were within the law inasmuch as they were residents of the School District for thirty (30) days. That the agent for the School Board present at the polling place, failed to provide or offer Anken the proper form for registering his challenge.

In paragraph "13" of this petition to the Commissioner, a hearing was requested by the petitioners, at which hear-

ing witnesses would be produced and oral arguments heard "as to the qualifications of the people who were permitted to vote at the District Meeting on January 15, 1971, including among others those who are 'guests' at Unity Acres, Orwell, New York", and further "That a recanvass and recount of said votes and ballots of said District Meeting on January 15, 1971, be made".

In its answer to the petition to the Commissioner, the respondent requests an opportunity for oral argument before the Commissioner in the event a hearing is granted.

The further allegation of petitioner Anken is that the official of the School District made no attempt to check whether or not these people from "Unity Acres" were proper residents of the District for voting purposes (*Note:* apparently there had not been a registration previous to the election).

By answer to the petition to the Commissioner, John T. Crichton states, in his affidavit, that he was appointed by the Board as chairman of the January 15, 1971, Special District Meeting, and he further stated:

> "That during the course of the time when the polls were open for the vote I was approached by Fred Anken. Mr. Anken had a long conversation with me during which he requested information regarding eligibility of the people residing at a place in Orwell called Unity Acres to vote on the proposition. I informed Mr. Anken that to be eligible they must be a citizen of the United States, at least twenty-one years of age, and a resident of the School District for thirty days or more, and that to the best of my knowledge these people met these qualifications. I told him there was nothing we could do about the persons who had already voted, but that we had available the necessary Declaration for use in the event a voter was challenged

and I went to the table where the ballot box was resting, picked up the Declaration sheets and showed them to Fred Anken. I told him that he had the right to challenge any votes if he wished, but that the voter had to be challenged before voting. I also told him that if a voter signed the necessary Declaration he could still vote, but if it turned out that he was not qualified to vote, he would be subject to a fine and penalty. Mr. Anken informed me that he did not wish to challenge, but that he thought that the qualifications for voting were not fair to taxpayers. I told him there wasn't anything I could do about that."

Thus, a question of fact arises as to what occurred at the election-meeting on January 15, 1971, between Anken and Crichton and others present.

Also, there arises a question of fact as to the purpose and manner of operation of "Unity Acres".

(See: Rev. McVey affidavit, dated: March 1, 1971.)

There is a question of fact as to the residency of the fifteen (15) named voters and others who voted at the election, and their qualification to vote.

These questions must be resolved at a hearing,—not on affidavits.

The probability that the results of the election would have been changed by the elimination of illegal votes cannot be determined until the results of a hearing are available.

This Court annuls the determination of the Commissioner and declares the said district meeting election to be null and void.

Order accordingly.

Dated: Fulton, New York, June 21, 1972.